IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1065 of 1997

in

SPECIAL CIVIL APPLICATION No 10834 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgement?-Yes.

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2. To be referred to the Reporter or not?-Yes.

3. Whether Their Lordships wish to see the fair copy of the judgement?-No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?-No.

5. Whether it is to be circulated to the Civil Judge?-No.

DILIPBHAI RASIKLAL SHAH

Versus

AMC

Appearance:

MR YF MEHTA for Appellants

TANNA ASSOCIATES for Respondent No. 1

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE M.C.PATEL

Date of decision: 04/03/99

ORAL JUDGEMENT: (Per C.K. Thakkar, Acting C.J.)

This appeal is filed against dismissal of Special Civil Application No.10834 of 1996 by the learned Single Judge on August 5, 1997.

The appellants were the original petitioners. They approached this Court by filing the above petition for an appropriate writ, direction or order, quashing and setting aside orders at Annexures `N', `O' and `P' and by directing the respondents to act in accordance with the provisions of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as "the Act") and in particular Rules 15, 17, 18 and 20 of Rules in Chapter VIII. A prayer was also made that during the pendency and final disposal of the petition, the respondents may be directed to deliver the vehicles seized from the appellants.

It was the case of the appellants that they filed Municipal Valuation Appeal No.18444 of 1988 in the Small Cause Court, Ahmedabad against demand of tax at excessive rate. In spite of the fact that the appeal was pending, the Corporation seized four vehicles belonging to the appellants for recovery of tax dues from the appellants. It was contended before the learned Single Judge that the respondent had no authority to seize the vehicles and issuance of distress warrant was unlawful and without authority of law.

The learned Single Judge issued notice to the Corporation and directed the respondent to deliver custody of the vehicles seized on certain terms and conditions as mentioned in the said order. After hearing both the parties, the learned Single Judge held that the petitioners were defaulters and they had invoked the jurisdiction of this Court under Article 226 of the Constitution with a view to avoiding payment of tax, which is a condition precedent for filing tax appeal under Section 406 of the Act. In the opinion of the learned Single Judge, it would not be appropriate to exercise extraordinary and discretionary powers in favour of tax defaulters. It also could not be said that distress warrant was without authority of law. In the alternative, the learned Single Judge observed that even if there was some substance in the contention of the learned counsel for the petitioners that the required procedure was not followed, they have remedy of filing a suit, inasmuch as, disputed questions of fact were involved and it would not be appropriate to agitate those questions by invoking the jurisdiction of this Court under Article 226 of the Constitution of India. The

petition was accordingly dismissed.

We have heard Mr.Y.F. Mehta, learned counsel for the appellants, and Mr.B.P. Tanna of Tanna Associates, learned counsel for the respondent...

contended by Mr.Mehta that the learned Single Judge has committed an error of law in not properly construing, interpreting and applying the provisions of Chapter VIII of Taxation Rules under the Act. Our attention was particularly invited to Rule 42 of the Taxation Rules. The said rule reads as under :-

> " 42.(1) If the person on whom a notice of demand has been served under rule 41 does not within fifteen days from such service pay the sum demanded or show sufficient cause for non-payment of the same to the satisfaction of the Commissioner, and if no appeal is preferred or entertained against the said tax, as hereinafter provided, such sum, with all costs of the recovery, may be levied under a warrant in Form II or to the like effect, to be issued by the Commissioner, by distress and sale of the movable property of the defaulter or the attachment and sale of the immovable property of the defaulter or, if the defaulter be the occupier of any premises in respect of which a property-tax is due, by distress and sale of any movable property found on the said premises or, if the tax be due in respect of any vehicle, boat or animal by distress and sale of such vehicle, boat or animal in whomsoever's ownership, possession or control, the same may be.
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> (2) If after the service of the notice of demand the amount of the said tax is paid but the fee for the notice is not paid the sum due on account of the said fee may be levied under a warrant in the Form H (mutatis mutandis) to be issued by the Commissioner in the same manner as if such sum were due on account of the tax."

The contention of the counsel for the appellants is that under the said Rule, if the person, on whom a notice of demand has been served under Rule 41, does not,

within fifteen days from such service, pay the sum demanded or show sufficient cause for non-payment of the dues, and if no appeal is preferred or entertained against the said tax, distress warrant can be issued. Mr.Mehta, ther...

preferred or entertained, it is not within the jurisdiction, authority, or power of the Corporation to issue distress warrant. In the instant case, it is not disputed that an appeal was preferred. The provision of Rule 42 would, therefore, be attracted and it was not open to the authorities to issue distress warrant.

In reply to the above contention, Mr.Tanna drew the attention of the Court to a substantive provision of Section 406 of the Act. Sub-section (2) of the said Section, which is material for our purpose, reads as under :-

> "... (2) No such appeal shall be entertained unless-
>
> (a) it is brought within fifteen days after the accrual of the cause of complaint;
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> (b) in the case of an appeal against a rateable value a complaint has previously been made to the Commissioner as provided under this Act and such complaint has been disposed of ;
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> (c) in the case of an appeal against any tax in respect of which provision exists under this Act for a complaint to be made to the Commissioner against the demand, such complaint has previously been made and disposed of ;
>
> (d) in the case of an appeal against any amendment made in the assessment book for property taxes during the official year, a complaint has been made by the person aggrieved within fifteen days after he first received notice of such amendment and his complaint has been disposed of;
>
> (e) in the case of an appeal against a tax, or in the case of an appeal made against a rateable value, the amount of the disputed tax claimed from the appellant, or

> the amount of the tax chargeable on the basis of the disputed rateable value, up to the date of filing the appeal, has been deposited by the appellant with the Commissioner;
>
> Provided that where in any particular case the judge is of the opinion that the deposit of the amount by the appellant will cause undue hardship to him, the judge may in his discretion, either unconditionally or subject to such conditions as he may think fit to impose, dispense with a part of the amount deposited so however that the part of the amount so dispensed with shall not exceed twenty five per cent. of the amount deposited or required to be deposited."

Reading sub-section (2), it is clear that no appeal can be entertained unless the conditions laid down in sub-section (2) are satisfied. The constitutional validity and vires of Section 406 came to be challenged before this Court, which was upheld and the provision was held ultra vires. The matter was then carried to the Apex Court. In The Anant Mills Co. Ltd. v. State of Gujarat and others, AIR 1975 SC 1234, the provisions of Section 406 of the Act were held intra vires and constitutional. It was held by the Apex Court that a right of appeal is a statutory right and if any party aggrieved by any decision intends to file an appeal under a statutory provision, the conditions laid down in the statute must be complied with. The provision, therefore, cannot be said to be unconstitutional. If no appeal can be entertained under the substantive provision of Section 406 of the Act in absence of fulfilment of necessary conditions, it cannot be said that appeal was entertained and was pending for final disposal.

In our considered view, the provision of Rule 42 of Chapter VIII must be read in consonance with and subject to the substantive provisions of the Act, viz., Section 406 of the Act, which is held constitutional and intra vires by the Hon'ble Supreme Court in Anant Mills. The connotation `preferred' or `entertained' should, therefore, be read as preferred and entertained in accordance with the provisions of Section 406 (parent Act). It is not disputed by the learned counsel for the appellants that necessary conditions laid down in sub-section (2) of Section 406 were not complied with and the amount was not deposited. The contention was that

once the appeal is preferred, notwithstanding payment of tax or non-compliance with the provisions of sub-section (2) of Section 406, no distress warrant could be issued as the case would be covered by Rule 42 of the Rules. No such interpretation can be accepted in the light of the substantive provision and the decision of the Supreme Court. We, therefore, do not see any ground to interfere with the order passed by the learned Single Judge. The Letters Patent appeal, therefore, deserves to be dismissed and is accordingly dismissed. Notice is discharged. No order as to costs.

We may observe that the matter was earlier argued. We had fully heard Mr.Y.F. Mehta, learned counsel for the appellants, and Mr.B.P. Tanna, learned counsel for the respondents. Time was, however, sought by the learned counsel for the appellant to withdraw L.P.A. Thereafter also, the matter appeared on Board, and a mention was also made for further time. On 1st March, 1999, the matter was on Board and it was stated that Mr.D.N. Patel would be appearing for the appellant and Mr.Mehta was not appearing in the matter. Time was sought as Mr.Patel was not available. Since the matter was already argued, we refused to grant time, but the matter was not called out in the second session. The matter has again come on Board today and, again, time is sought. In view of the fact that the matter was already heard and was adjourned only for withdrawal, we have refused the request for time.

As we find no merits in the appeal, we dismiss L.P.A. Since the matter has come in this Court at the stage of issuance of distress warrant, we express no opinion on merits. We may not be understood to have stated anything on rival contentions of the parties.

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(apj)